

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**L.R., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Nashville, TN, Employer**

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**Docket No. 06-1608  
Issued: October 25, 2006**

*Appearances:*  
*Appellant, pro se*  
*Office of the Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 3, 2006 appellant filed a timely appeal from Office of Workers' Compensation Programs' schedule award decision dated April 4, 2006. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award claim.

**ISSUE**

The issue is whether appellant has more than a two percent permanent impairment of his right upper extremity.

**FACTUAL HISTORY**

Appellant, a 48-year-old mail handler, filed a Form CA-2 claim for benefits on July 21, 2003, alleging that he developed a right shoulder condition causally related to factors of his federal employment. The Office accepted the claim for right rotator cuff syndrome.

On January 19, 2005 appellant underwent arthroscopic surgery for subacromial decompression, distal excision and rotator cuff repair of the right shoulder. The procedure was performed by Dr. Sean Kaminsky, a specialist in orthopedic surgery.

On June 19, 2005 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his right shoulder. In a report dated June 3, 2005, Dr. Kaminsky found that appellant had an 8 percent right upper extremity impairment based upon active and passive forward elevation of the shoulder to 170 degrees and passive external rotation of 70 degrees.

In a report dated August 18, 2005, an Office medical adviser accorded appellant a one percent right upper extremity impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5<sup>th</sup> ed. 2001). In making the impairment rating, the Office medical adviser relied on Figure 16-40, page 476; Figure 16-43, page 477; and Figure 16-46, page 479 the A.M.A., *Guides*.

The Office determined there was a conflict in the medical evidence between Dr. Kaminsky and the Office medical adviser regarding the degree of impairment to appellant's right shoulder. In order to resolve the conflict, the Office referred appellant to Dr. Jan M. Gorzny, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated December 23, 2005, Dr. Gorzny found that appellant had a four percent impairment of the right upper extremity under the A.M.A., *Guides*. He stated:

“Retained flexion of 160 degrees, according to Table 16-40, leads to [1] percent impairment, retained abduction of 150 degrees, according to Table 16-43, carries a [1] percent impairment, internal rotation of 80 degrees and external rotation of 70 degrees carries a [0] percent impairment each. Combined impairment in relation to range of motion is two percent.

“According to evaluation of weakness and retained strength which is estimated to be at four plus in abduction and flexion, leads to one percent impairment each according to Table 16-35.<sup>1</sup> Total impairment according to retained strength of four plus in abduction and forward flexion is two percent. The two percent strength impairment combined with two percent range of motion impairment leads to a combined and total impairment of the right shoulder of four percent.”

In a January 12, 2006 report, the Office medical adviser found that, pursuant to Figure 16-35, page 517, Dr. Gorzny erred in combining impairment ratings for strength and range of motion. In response to the Office medical adviser's request for clarification, Dr. Gorzny submitted a report dated March 2, 2006. He revised the right upper extremity impairment rating to find a two percent impairment for loss of range of motion.

On April 4, 2006 the Office granted appellant a schedule award for a two percent permanent impairment of the right upper extremity for the period May 17 to June 29, 2005, for a total of 6.24 weeks of compensation.

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<sup>1</sup> A.M.A., *Guides* 473, Figure 16-35.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> sets forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.<sup>3</sup> However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (5<sup>th</sup> ed. 2001) as the standard to be used for evaluating schedule losses.<sup>4</sup>

5 U.S.C. § 8123(a) of the Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.

### **ANALYSIS**

In this case, the Office found that appellant had two percent impairment for the right upper extremity based on the December 23, 2005 and March 2, 2006 reports from Dr. Gorzny, the impartial medical examiner. Appellant was referred to Dr. Gorzny based upon the conflict in medical evidence between appellant's treating physician, Dr. Kaminsky and an Office medical adviser.

On December 23, 2005 Dr. Gorzny calculated a four percent right upper extremity impairment based on combining loss of range of motion and strength impairments. He calculated appellant's range of motion impairment by deriving a 1 percent impairment from retained flexion of 160 degrees, pursuant to Figure 16-40 and a 1 percent impairment from abduction of 150 degrees, pursuant to Figure 16-43. Dr. Gorzny then combined these two values for a total two percent impairment for loss of range of motion. The Office medical adviser advised credited this finding was in conformance with the applicable figures of the A.M.A., *Guides*. The Office medical adviser found, however, that Dr. Gorzny's combining of an impairment for loss of range of motion with a impairment based on loss of strength was not permitted under the A.M.A., *Guides* and requested clarification.

In a supplemental report dated March 2, 2006, Dr. Gorzny amended the right upper extremity rating to find a total two percent impairment based on loss of range of motion to appellant's right upper extremity. He noted that loss of range of motion could not be combined with impairment for loss of strength, pursuant to the A.M.A., *Guides*. The Office adopted this amended impairment rating from the impartial medical specialist.

The Board finds that Dr. Gorzny's finding of a two percent impairment of the right upper extremity based on loss of range of motion was proper pursuant to Figures 16-40 and 16-43.

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<sup>2</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>3</sup> 5 U.S.C. § 8107(c)(19).

<sup>4</sup> 20 C.F.R. § 10.404.

Figure 16-40<sup>5</sup> measures upper extremity motion impairments due to lack of flexion and extension of the shoulder. Appellant's retained flexion of 160 degrees is rated as 1 percent impairment pursuant to this figure. Figure 16-43<sup>6</sup> measures upper extremity motion impairment due to lack of abduction and adduction of the shoulder. Appellant's retained abduction of 150 degrees is also rated as 1 percent impairment pursuant to this figure. However, appellant's retained internal and external rotation (extension and adduction) remain so great that they are not ratable under these figures. Therefore, he has a two percent right upper extremity impairment for loss of motion of the shoulder.

The Board notes that an award based on loss of range of motion cannot be combined with one based on muscle strength or loss of muscle atrophy pursuant to Table 17-2 at page 526 of the A.M.A., *Guides*.<sup>7</sup>

Therefore, as there is no probative medical evidence establishing that appellant has greater permanent impairment. Appellant has no more than a two percent permanent impairment to his right upper extremity.

### **CONCLUSION**

The Board finds that appellant has no more than a two percent impairment of the right upper extremity.

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<sup>5</sup> A.M.A., *Guides* 476.

<sup>6</sup> *Id.* at 477.

<sup>7</sup> See *id.* at 508, 16.8a. Decreased strength is not to be rated in the presence of decreased motion. See also *James R. Taylor*, 56 ECAB \_\_\_\_ (Docket No. 05-135, issued May 13, 2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 4, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board